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No. 79-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ASHLAND OIL, INC.,
Petitioner,

v.

PHILLIPS PETROLEUM COMPANY

and

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in deciding that the district court had not departed from a prior ruling of the court of appeals in its retrial of certain issues relating to the determination of the wellhead value of helium commingled with natural gas.

2. Whether the court of appeals erred in declining to award postjudgment interest from the date of the original district court judgment when the court of appeals had set aside that judgment and remanded for a redetermination that resulted in the entry of a very different judgment.

STATEMENT

This petition presents questions of no general importance arising out of the judgment of the Court of Appeals for the Tenth Circuit that is also the subject of respondent Phillips Petroleum Company's petition, No. 79-1250. The facts that relate generally to the litigation between Ashland Oil, Inc., petitioner here, and Phillips are fully stated in Phillips' petition. We state the facts particularly relevant to Ashland's questions briefly here.

Ashland's claim is for the value of helium commingled with combustible gas that it produced and sold to Phillips under long-term contracts. Phillips built extraction facilities pursuant to a contract with the Government and between 1962 and 1973 extracted helium from the natural gas and sold it to the Government for conservation. On a theory that is challenged in No. 79-1250, the court of appeals has held that Ashland is entitled to compensation at the wellhead for helium extracted by Phillips and sold by it to the Government in addition to what is provided for in Ashland's contracts with Phillips.

Ashland's claim was first tried in 1973. A threshold issue was whether the helium should be valued according to a so-called workback method or according to the more usual method of looking to comparable sales.

Ashland was the proponent of the workback method. It posited starting values ranging from a "high value" of $20 per mcf for Grade A (refined) helium to a "low value" of the Phillips-Government contract price for crude helium, about $11 per mcf. Phillips and the United States, which was an intervenor aligned on Phillips' side because of a potential contractual liability to indemnify Phillips, urged the traditional comparable sales method, familiar in condemnation and similar kinds of cases. They placed little or no emphasis in their evidentiary presentations on workback valuation. Most comparable sales placed a negotiated value on helium of $2 to $3 per mcf delivered at the inlet side of helium extraction plants. The trial court adopted Ashland's workback method, on the ground that there were too few comparable sales to be helpful, and worked back from Ashland's "high value" of $20 per mcf by deducting estimated costs of producing Grade A helium, thereby reaching a wellhead value ranging from $11.76 to $16.98. (Pet. App. 107a.) The trial court also awarded Ashland attorneys fees and determined that Ashland should split its recovery with its royalty owners, who were not parties to the case. (*Id.* at 118a.)

On appeal, the court of appeals en banc reversed the award of attorneys fees and the award to the royalty owners and affirmed an award of prejudgment interest. Principally, it affirmed the trial court's use of the workback method of valuation. But it was not satisfied with the way the district court had applied the method and therefore reversed the district court judgment in part and remanded for a complete revaluation. It said:

> "We set aside the value which the trial court determined by the use of the work-back method.

> On remand the trial court shall give further consideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the workback method . . . ." (Pet. App. 30a.)

After petitions for certiorari filed by Phillips and the Government were denied, the case was taken up by the district court again on the remand. At a pretrial conference, the court and counsel agreed that the issue for redetermination was the reasonable value at the wellhead of helium extracted by Phillips from natural gas purchased from Ashland.[1] The method of valuation would of course be the workback method, approved on the first appeal. But the court of appeals had said that the district court on the remand should "consider whatever other elements that may be developed at further hearing, in making the value less expense or work-back determination" (*id.*), so that Phillips and the United States prepared and presented and the court entertained detailed evidence analyzing and applying the workback method.

In particular, the evidence on behalf of Phillips and the Government tended to show that the crude helium market, not the refined helium market as contended by Ashland, was the proper starting point and that the Phillips-Government contract price was an appropriate index to the fair market value for crude helium. (Pet. App. 65a, 67a-71a.) Among other things,

[1] The pretrial order appears in volume IV of the record on appeal at p. 936.

they refuted Ashland's earlier contention that the Phillips-Government contract price was not representative of the market because it was depressed on account of the presence of the indemnification clause. (*Id.* at 72a-73a.) The trial court concluded that, if the contract price deviated at all from the fair market value of crude helium, it was not too low but slightly too high. (*Id.* at 73a.) Accordingly, the court was confident of the contract price as a fair starting point.

Ashland chose to focus its evidence on the refined helium market as the starting point. As a result of extensive pretrial discussions in which Phillips and the Government fully disclosed that they expected to prove that the crude helium market and the Phillips-Government crude helium contract price were appropriate starting points, Ashland had an adequate opportunity to find and present rebuttal evidence if any existed. Not once did Ashland complain of having too little time or otherwise being constrained in responding to its adversaries' case on the proper workback starting point, either during discovery or at trial.

Also determined during the remand trial were Phillips' helium extraction costs, including operating costs, capital costs—depreciation, interest and a return element—and income taxes and certain cost allocation questions. The trial court confirmed the court of appeals' finding that significant elements of the workback method of valuation had not been sufficiently developed during the original trial. It said that "[i]n the first trial plaintiff and defendants' legal theories and approaches were sufficiently divergent to prevent a joining of issues. Consequently, crucial factual considerations were never fully developed evidentially."

(*Id.* at 63a.) On the basis of the evidence presented, the trial court arrived at a value of $3 per mcf for the commingled helium at the wellhead.

The court of appeals affirmed the major aspects of the district court judgment in a short per curiam opinion. It said that under the earlier mandate of the court of appeals en banc the trial court was "to determine a proper starting place and value" and facts related to costs and return bearing on ultimate valuation. (Pet. App. 2a.) It recognized the Phillips-Government contract price as an appropriate starting point for determining the value of helium and affirmed the trial court's wellhead valuation of $3 per mcf. (*Id.* at 2a-3a.) Because an award of prejudgment interest had been affirmed on the previous appeal, and the trial court had not included such an award in its new judgment, the court of appeals remanded to it for the ministerial act of entering a judgment that would include prejudgment interest. The court of appeals ruled that postjudgment interest should accrue from the date of the judgment on remand and not from the date of the first judgment, "in view of the extent to which the case was reversed . . . ." (*Id.* at 3a.)

ARGUMENT

Ashland presents two questions, each uniquely related to the facts of this case and each plainly within the peculiar competence of the court of appeals. Neither question presented by Ashland would be reached if the important and substantial question of law presented by Phillips in No. 79-1250 were decided in Phillips' favor. Ashland has stated no good reason why this Court should hear its questions even on the

assumption that its petition were treated as a cross-petition that assumed review of the fundamental issue posed by Phillips' petition.

1. "Law of the case" is lawyers' jargon for one aspect of a very simple idea. The idea is that, because resources including human time and energy are finite, a field once ploughed usually should not be reploughed even though the furrows are not quite straight. Specifically, in contrast to its cousin terms res judicata and collateral estoppel, which refer to successive actions, law of the case means that in a continuing case a subordinate tribunal should not depart from a rule already established in that case by a superior tribunal even though on further consideration or further evidence the rule appears dubious.[2]

No one is in nearly as good a position as the superior tribunal itself to decide whether the subordinate tribunal has been faithful to its prior rulings. In this case Ashland argued to the court of appeals ad nauseam that the district court had ignored the law of the case or, putting the same argument in other terms, had evaded the court of appeals' mandate by refining its workback valuation techniques on the retrial and, in particular, by choosing a new starting point for the application of the method. The court of appeals,

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[2] Contrary to Ashland's assertion, the law of the case doctrine strictly does not preclude the reconsideration by the superior tribunal of its own ruling. Insurance Group Comm. v. Denver & R.G.W.R.R., 329 U.S. 607, 612 (1947), cited by Ashland for its assertion (Pet. 12 & n.5), does not stand for the erroneous proposition that an appellate court's power is so limited but only for the familiar proposition that an appellate court may refuse to reopen a ruling once made by it. *See, e.g.*, Messenger v. Anderson, 225 U.S. 436, 444 (1912).

through a panel, rejected these arguments, saying that it saw no objection to "the use of the contract value" as a starting point. (Pet. App. 2a.) The panel was of course acutely aware of what had been decided by the court en banc on the previous appeal. Judge Seth, who sat on the panel, had written the en banc opinion. Obviously the panel was cognizant of the law of the case doctrine. It directed that the case be remanded for the inclusion of prejudgment interest in the award to Ashland on the sole ground that the award of prejudgment interest was approved on the prior appeal and thus "became the law of the case." (*Id.* at 3a.) Furthermore, the other members of the court of appeals had their chance to correct any mistake in the panel's interpretation of the en banc opinion. Ashland addressed its law-of-the-case, evasion-of-the-mandate argument to the entire court in its petition for rehearing and suggestion of rehearing en banc. The response was unequivocal. The order denying the petition recited that "no member of the panel nor judge in regular active service on the Court [had] requested that the Court be polled on rehearing en banc . . . ." (Pet. App. 7a.)

A careful reading of the en banc opinion of 1977 reveals that Ashland's argument is implausible, quite apart from the fact that it has been rejected by the one tribunal in the best position to evaluate it. At the outset of its discussion of the district court's application of the workback method in the first trial, the court of appeals en banc said, after noting the trial court's $20 per mcf starting figure, "[o]n remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting

value." (Pet. App. 21a.) And near the end of the opinion, the court said:

> "On remand the trial court shall give further consideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value . . . and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method." (*Id.* at 30a.)

Ashland seizes on two parts of the en banc opinion as qualifying these broad and unambiguous statements. One is the court of appeals' approval of the trial court's assignment of $2 per mcf as the cost of refining Grade A helium from crude helium. (Pet. 8-9, 18 n.16; *see* Pet. App. 30a.) Ashland's chain of inference seems to be that, because refining is an expense that would not have to be accounted for in working back from a value of crude helium rather than pure helium, the court must have meant that the starting point for the workback should be the value of pure helium. Surely that is a flawed chain. Even if the district court was not bound on the remand to use pure helium value as a starting point, it was free to do so. If the court of appeals was satisfied with one element of costs that must be deducted to reach wellhead value if the district court elected to start with a pure helium price, it was appropriate for it to say so. Its saying so implies nothing as to the district court's freedom to choose another starting point. The other part of the opinion on which Ashland relies is the court's statement that "[t]he value here sought to be established is independent of the contract base amount . . . ." (Pet. 8, 18 n.16; *see* Pet. App. 23a.) That statement can be understood only in context. It was made in the last sentence of a paragraph that opened with the court's

statement of the Government's criticism that the district court's original wellhead valuation of commingled helium exceeded the base price for extracted crude helium in the Government-Phillips contract. (Pet. App. 22a.) In that long paragraph the court responded to the Government's point. In the context of its response it was appropriate for the court to note that the value sought to be established was indeed independent of a particular contractual price of extracted crude helium; it might be less or it might be more. The fact, however, that the desired wellhead value is independent of any contract price in that sense does not mean that the Phillips-Government contract price is not the best evidence of a crude helium market value from which the workback computation of the wellhead value may begin. That is what the district court decided on remand.[3]

In the court of appeals Ashland argued its law-of-the-case, evasion-of-the-mandate point as a dry question of law. It made no claim to have been surprised by what happened in the district court, much less to have been denied a fair opportunity to meet the valuation case Phillips and the Government made on remand. Only after the decision of the panel did it alter slightly the pattern of its argument. In its petition for rehear-

[3] Ashland implies that on the first appeal the basic position of Phillips and the Government was to favor a workback method starting from the contract price and that therefore the court of appeals has completely reversed itself, deciding first for Ashland and on the second appeal for Phillips and the Government. (Pet. 7-8, 16-18.) That argument is misleading. Phillips and the Government argued primarily for no liability at all and secondarily for liability related to a valuation based on comparable sales. (Pet. App. 13a-20a.) Only if they prevailed on neither of those arguments did they urge, as the least unfavorable application of the workback method that Ashland sponsored, a workback calculation that would start with the Phillips-Government contract price.

ing it made the unelaborated statement that "Ashland relied on the en banc decision on these matters on remand as being the law of the case, in presenting its evidence." It is hard to know in what relevant sense Ashland may be said to have "relied" on any en banc ruling. Ashland was fully informed, well ahead of discovery and trial, that the other parties and the court understood that more was open on the remand than it professed to believe. Ashland took the depositions of all of the remand witnesses to be presented by Phillips or the Government, including their experts. If, thereafter, Ashland chose not to contest or try to rebut their testimony as to the proper workback starting point at trial, that was a deliberate trial tactic. Ashland never complained to the trial court that it was pressed for time or otherwise lacked the opportunity to respond to the evidence. Ashland's attempt to color its case in this Court with factitious suggestions that it was deprived of a fair trial (Pet. 2, 14-15, 18) is thus without the slightest support. Its legitimate argument can only be the same dry argument it addressed to the court of appeals; it had little enough appeal there; it has none here.

2. The court of appeals, noting that Ashland had urged "that postjudgment interest commence upon the date of the first judgment and not at the end of remand trial," said that "we must hold under 28 U.S.C. § 1961, in view of the extent to which the case was reversed, 'the judgment' for the purpose of interest was that entered by the trial court on remand." (Pet. App. 3a.) It cited *Hysell* v. *Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977).

Ashland asserts that there is a conflict among the circuits on the question thus decided. But all that was

decided was that interest accrued from the second judgment "in view of the extent to which the case was reversed." There could be a conflict only if Ashland were able to invite our attention to another case in another circuit in which a judgment reversed to the same extent as the original judgment in this case was taken as the point for the beginning of the accrual of interest. Ashland cites no such case. The court below did not make any such hard and fast decision as Ashland implies. It did not decide that, under 28 U.S.C. § 1961, it is only the very last judgment from which interest is dated. If that had been its view, it would have specified as the critical judgment for postjudgment interest the judgment to be entered by the district court on the further ministerial remand for the inclusion in Ashland's award of prejudgment interest.

Nor has any other federal court ruled that, as a matter of law, interest begins only after the very last judgment, on the one hand, or, on the other, always begins after the first judgment, however much it may be altered in further appellate and trial litigation. It is true that some courts have allowed postjudgment interest to accrue from the time of an original trial court judgment rather than a later revised judgment on portions of the original judgment that remain intact. In cases where judgment on an item is revised and an entirely new factual determination regarding that item replaces the old judgment, however, the general rule is that the revised item bears interest only from the entry of the modified judgment. *See* Note, *Interest on Judgments in the Federal Courts,* 64 Yale L.J. 1019, 1042-43 (1955). That is this case. Where the courts of appeals have deviated from that general rule, it has been in response to particular equitable concerns in particular cases. Here the only relevant equitable

consideration, the fact that Ashland was in any event to receive prejudgment interest, militated in favor of following the general rule and treating the fundamentally revised remand judgment as the "judgment" within the meaning of Section 1961.[4]

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[4] By contrast, a concern that claims for attorneys fees "are not entitled to prejudgment interest" moved the court in Perkins v. Standard Oil Co. of Cal., 487 F.2d 672, 675 (9th Cir. 1973), one of the cases with which Ashland claims a conflict, to allow interest from first entry of judgment even though the attorneys fees were later reduced.

The other cases cited by Ashland either (1) do not involve any factual redetermination between the first judgment and the second or (2) do not arise under 28 U.S.C. § 1961 or a predecessor. In Premier Corp. v. Serrano, 471 F. Supp. 444 (S.D. Fla. 1979), the district court expressly noted that, since there were no new factual determinations in subsequent proceedings and no reversal by a court of appeals, the case was distinguishable from Hysell v. Iowa Pub. Serv. Co., 559 F.2d 468 (8th Cir. 1977), which the court cited here as authority. 471 F. Supp. at 445.

De La Rama v. De La Rama, 241 U.S. 154 (1916) (division of property in divorce), and Kneeland v. American Loan and Trust Co., 138 U.S. 509 (1891) (rental allowances in railroad foreclosure suit), did not arise under § 1961. Moreover, those cases were both affirmances of lower court decisions in which this Court simply declined to find that the lower court exceeded its discretion when it awarded postjudgment interest from the earliest trial court judgment. They confirm that the question is a discretionary judgment, based on all the relevant circumstances. Similarly, the judgment in Swartzbaugh Mfg. Co. v. United States, 289 F.2d 81 (6th Cir. 1961), based on government contract provisions and determined in the Armed Services Board of Contract Appeals, did not arise under § 1961. In that case the Sixth Circuit refused to find error in the Government's set-off of interest along with principal from the time of a contracting officer's second appraisal, subsequently revised on appeal by the Board, where the parties had failed since 1950 to resolve the matter according to the terms of their contract. In Petition of U.S. Steel Corp., 479 F.2d 489 (6th Cir.), *cert. denied,* 414 U.S. 859 (1973), a case involving seamen's personal injury claims and seamen's death claims by spouses, the Sixth Circuit awarded interest from the earliest trial judgment, relying on *Swartzbaugh* without comment or reference to § 1961.

In *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304 (1948), the issue that the dissenters asserted was left unresolved despite a conflict (Pet. 21) was the very specific issue of whether interest should run from the time of the return of a jury verdict for damages that is reinstated on appeal after a judgment n.o.v. in the trial court.[5] A decision in this case would not necessarily resolve that question.

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[5] Both Woods Explor'n & Prod. Co. v. Aluminum Co. of Am., 509 F.2d 784 (5th Cir.), *cert. denied*, 423 U.S. 833 (1975), and Givens v. Missouri-Kan.-Tex. R.R., 196 F.2d 905 (5th Cir. 1952), cited by Ashland, raise the *Briggs* issue. In each case, the court of appeals simply reversed the trial court's judgment n.o.v. and ordered that judgment be entered on the jury verdict. In those cases interest was granted from the date of judgment n.o.v. Louisiana and Ark. Ry. v. Pratt, 142 F.2d 847 (5th Cir. 1944), cited as authority in *Woods* and *Givens*, differs from those cases only in that the court of appeals awarded interest from the time of verdict instead of the time of judgment n.o.v. Apparently moved by the fact that FELA—on which the action was grounded—allowed no interest prior to verdict, the Fifth Circuit in *Pratt* reasoned that the equity of the statutory predecessor to § 1961 and the requirements of Fed. R. Civ. P. 58 that judgment on the verdict be entered forthwith by the clerk justified accrual of interest from the date of verdict.

CONCLUSION

The petition should be denied. The questions presented are insignificant ones, unlike the fundamental, threshold question presented in No. 79-1250.

Respectfully submitted,

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